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IN THE

Supreme Court of the United States

October Term, 1971

No. _____

OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO AND IRA THOMPSON,
Petitioners,

vs.

THE INSURANCE RATING BOARD, UNITED STATES FIDELITY AND GUARANTY COMPANY, and EUGENE BROWN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Ohio AFL-CIO, The United Autoworkers of Ohio, and Ira Thompson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 30, 1971.

OPINION BELOW

The opinion of the Court of Appeals is reported at 451 F.2d 1178 and appears in the Appendix hereto. The opinion of the District Court for the Southern District of Ohio, Eastern Division, which is unreported, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 30, 1971. On February 18, 1972, this Court ordered that the time for filing a petition for writ of certiorari in the instant cause be extended to and including April 28, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* exempt the automobile insurance industry in Ohio from the Sherman Anti-trust Act simply because the State of Ohio has a statute purportedly regulating said industry?

2. On a motion to dismiss a complaint alleging Sherman Act violations relating to the automobile insurance price fixing, does the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, grant immunity to the defendants as a matter of law in the face of factual allegations, supported by affidavits, that the state does not "effectively" regulate the industry?

3. On a motion to dismiss a complaint alleging Sherman Act violations relating to automobile insurance price fixing, does the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, grant immunity to the defendants as a matter of law in the face of factual allegations supported by affidavit that demonstrate that the legislative scheme is "mere pretense" and that the state has in fact abdicated its function in favor of regulation by the industry itself?

STATUTES INVOLVED

15 U.S.C. § 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulations or taxation of such business by the several States. Mar. 9, 1945, c. 20, § 1, 59 Stat. 33.

15 U.S.C. § 1012. Regulation by State Law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, *shall be applicable to the business of insurance to the extent that such business is not regulated by State law*. Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448. (Emphasis added.)

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because a question arises under the Sherman Anti-Trust Act, 15 U.S.C. § 1, *et seq.*, and the McCarran-Ferguson Act, 15 U.S.C. § 1012. This suit was filed against the Insurance Rating Board, (hereinafter IRB), one of its members, United States Fidelity and Guaranty, (hereinafter USF&G), and the Ohio Superintendent of Insurance.

The Complaint alleged violation of the Sherman Anti-Trust Act by combination and conspiracy in the fixing of the price of automobile insurance premiums charged to the consuming public; that rate increases were unilaterally instituted by the IRB in Ohio in 1965, 1966, and 1968 for automobile liability and property damage insurance without any state regulation; and that although the petitioners herein challenged the 1965 rate increase before the Department of Insurance, it was held by the Ohio Court that the petitioners could not challenge an automobile insurance rate increase.

In the district court, the defendants, IRB and USF&G, moved to dismiss on the grounds of lack of subject matter jurisdiction in that court due to the exemption of insurance industry from anti-trust laws by the McCarran-Ferguson Act 15 U.S.C. § 1012.

The trial court found that two issues were presented by the pleading:

> Plaintiffs argue that 'regulation' means '*effective*' regulation . . . .
>
> Plaintiffs further argue that when statutory provisions are a 'mere pretense' they do not constitute regulations of the business of insurance. (Opinion and Order Trial Court P. 28, *infra.*)

The lower court found that Ohio has a statute that purports to regulate insurance, and, therefore, held that it lacked jurisdiction of the subject matter under the McCarran-Ferguson Act and granted the motion to dismiss. Its decision was affirmed by the Court of Appeals for the Sixth Circuit.

The Complaint (P. 17, *infra*) alleged among other things that:

> "On July 8, 1968, the Insurance Rating Board by its unilateral action of filing a rate increase, raised automobile insurance premiums charged by its members, subscribers and affiliates throughout the state of Ohio, all without any state regulation to the detriment of the members of the Ohio AFL-CIO, Ira Thompson, and all others similarly situated." (Complaint para. 4)

In addition to the allegation of the unilateral increase by the insurance industry, the plaintiffs further alleged that the foregoing illegal activity was but the last act in a continuous pattern of illegal price fixing dating back to 1948 to:

> ". .fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and other several states." (Complaint para. 13)

The Ohio insurance statutes are alleged to be a mere "pretense" and not regulation:

> ". . . each rate filing becomes effective immediately upon its filing and is deemed to comply with such sections of the Ohio Code as relate to insurance rate making unless such filing is later disapproved by the Superintendent of Insurance." (Complaint para. 17)
>
> ". . . that such rate increases have never been challenged by the Ohio Department of Insurance." (Complaint para. 18)

> "... insurance companies engage in discriminating actions by determining certain classes of people and certain geographical areas where they will not write automobile insurance coverage..." (Complaint para. 24)

> "... the state agency serves only as a repository for the rate filings." (Complaint para. 22)

The Complaint alleged that the public is afforded no opportunity for judicial review but that the courts of the state are open only to an insurance company to challenge a rate change.

The plaintiffs further alleged that if a general policy did exist under Ohio law, it had not been enforced, and the state had abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself. (Complaint para. 19)

Despite these specific factual allegations of "mere pretense" and the finding of the trial court the Court of Appeals found that:

> The pertinent question before him on the Motion to Dismiss was the existence in Ohio of a statutory scheme of regulation sufficient to satisfy the McCarran Act *and not how the scheme worked in actual practice.*

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Section 1012 of the McCarran-Ferguson Act provides, in part, that the Sherman Anti-Trust Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

The absence of a blanket exemption should be considered in light of settled law that immunity from the anti-trust law is not lightly implied. *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

In *FTC v. National Casualty Company*, 357 U.S. 560 (1958), the court acknowledged that "regulation" which is "mere pretense" is insufficient. The Court pointed out that *"Petitioner does not argue that the statutory provisions here under review were mere pretense."*

Clearly, in the present case, the "sham and pretense" argument is made. How else can one construe the allegations of unilateral price increases in insurance rates year after year without state challenge? Or, an allegation that the Department of Insurance does not employ an actuary so as to be able to examine rate filings? Or, an allegation that the public may not challenge a rate increase in court? Or, an allegation that the state has abdicated its function of regulating in favor of the industry regulating itself?

The Ohio law provides that the rate filing becomes effective immediately upon filing and is *deemed* to comply under the sections of the Ohio Code relating to insurance rate making unless later disapproved by the Super-

intendent of Insurance. Ohio has what is called a "file and use" law.[1] This system is characterized as being substantially the same as the automobile *insurance industry's freedom from regulation which previously has existed in Ohio. Rose, Regulation of Property and Casualty Insurance Rates*, 32 Ohio St. L.J. 487, 492 (1971).

Clearly, in enacting the McCarran-Ferguson Act, as stated in *SEC V. National Securities, Inc.*, 393 U.S. 453, 458-59 (1969), "Congress was mainly concerned with the relationship between insurance rate making and the antitrust laws . . ."

As observed by *Rose, supra* at 499:

> "In deciding to permit concerted action through rate bureaus and advisory organizations under the umbrella of the McCarran-Ferguson Act, Ohio and most other states validated an activity through which, in the absence of public control, industry members may collusively fix prices and secure excessive rates. These excessive rates may be reflected not only in the magnitude of profits, but also in the size and nature of operating expenses passed on to the public through rates."

Under the Ohio "system", in over twenty (20) years, the Department of Insurance has conducted only seven (7) hearings: *Rose, supra*, 510 n. 103. Apparently, only one of the seven (7) hearings, the challenge by petitioners herein to the rates instituted in 1966 by the rating bureau, involved a challenge to the rate which was instituted.

---

[1] Rose, Ohio St. L. J. 487, 492 n. 33 states: Prior to adoption of file-and-use, casualty insurance rates were unregulated. Purportedly, the absence of regulation was because competition was the rule rather than the exception for casualty insurance (particularly in the automobile lines). In addition, casualty insurance was a relatively insignificant form of coverage during the first half of the twentieth century. *See* E. PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 268-69 (1927); Mertz, *The First Twenty Years—A Case-Law Commentary on Insurance Regulation Under the Commerce Clause*, 1963-64 PROCEEDINGS, ABA-INSURANCE SECTION 151-61; Moser, *Operation of Independents Under the Rate Regulatory Pattern*, 15 LAW & CONTEMP. PROB. 523, 526-27 (1950).

It is the contention of petitioners that the provisions of the McCarran-Ferguson Act exempting the business of insurance from anti-trust laws "to the extent that such business is not regulated by State law" mandates a requirement of regulation that is more than a mere pretense.

An examination of the legislative history of the McCarran-Ferguson Act is revealing.

Senator Barkley:

> If any state, through its legislature, undertakes to go through the form of regulations merely to put insurance companies within that state on an island of safety from Congressional legislation, that effort will be futile. 91 Cong. Rec. 1488 (1945).

Attorney General Biddle:

> The view we hold toward insurance is not unlike our policy toward railroad rates, that the fixing of rates by private groups *without active definite state approval is clear contravention* not only of the Sherman Act but also of the whole theory which underlies the Act, the theory that competition should be free unless it is specifically regulated by the appropriate body. . . . I think there is no doubt at all that insurance rates which are approved by a state are not subject to the Sherman Anti-Trust Act. By that I mean that if a group of insurance companies agreed on rates and filed them with a state commission, *and that body took active and definite action, made active and definite approval of those rates* (italics supplied) in that case I think the matter would not be involved at all in the Sherman Act. Quoted by Orfield, Improving State Regulation of Insurance, 32 Minn. L. Rev. 219, 225-7 (1948).

President Roosevelt (upon signing Public Law 15):

> . . . the anti-trust laws . . . will be applicable in full force and effect to the business of insurance except

> to the extent that the states have assumed the responsibility, *and are effectively performing that responsibility,* (italics supplied) for the regulation of whatever aspects of the insurance business may be involved. . . . Congress did not intend to permit private rate fixing, which the anti-trust acts forbid, but was willing to permit actual regulation of rates by affirmative action of the states. White House Release March 10, 1945, quoted in *Donovan, Regulation of Insurance Under the McCarran Act,* 15 Law & Contemp. Prob. 473, 478 (1950).

The Senate debate on the McCarran-Ferguson Act shows that Congress intended and believed that actual or real rejection of rates was required.

The following excerpt is from the debate on the conference committee report:

Senator Ferguson:

> . . . insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.

Senator O'Mahoney:

> I believe the Senator from Michigan went a little further than was his intention when he said that if the States have legislated certain things will take place. *The bill says if the States have regulated.* (Emphasis added.)

* * * *

Senator Barkley (Kentucky):

> I should like to ask, in this connection, whether, where States attempt to occupy the field—but do it inadequately—by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the

Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply?

Senator McCarran:

That is my interpretation.

91 Cong. Rec. at 1442-44

After the Act's passage, Senator O'Mahoney said:

It will not be sufficient merely to announce the principle or to pass laws in the several states which formally assert state authority. *If there is to be state regulation, the states must have insurance departments which are competent to regulate, that is to say, which are competent to examine, audit, and understand the complexities of the insurance business".* Address before the Insurance Federation of New York, December 5, 1945, quoted in Orfield, Improving State Regulation of Insurance, 32 Minn. L. Rev. 219, 227 (1948).
(Emphasis added.)

That Congress regarded effective enforcement of a state statute as a prerequisite of anti-trust immunity is also inferable from its rejection of the Walter-Bailey-Van Nuys Bill. The aforesaid bill would have exempted the insurance industry completely from federal anti-trust laws.

A Justice Department survey revealing that one-half of the states where Rating Bureaus operated had inadequate provisions for regulating insurance companies, thereby leaving the public at the mercy of price-fixing combinations that are illegal under the Sherman Act, is one reason the bill did not pass. (See Joint Hearing Before the Subcommittee of the Committee on the Judiciary

on S. 1362, H.R. 3269, and H.R. 3270, 78th Cong. 1st sess., 55-57 (1943).

If Congress was unwilling to place insurance rate making combinations entirely beyond the reach of the anti-trust laws, then it is unlikely that Congress intended to acquiesce in the states' practice of circumventing the anti-trust laws by passing deficient statutes or by failing to enforce adequate ones. For legal commentaries supporting this position see *Orfield, Improving State Regulation of Insurance*, 32 Minn. L. Rev. 219, 224 (1948); *Berge, Insurance and the Anti-trust Laws*, Proceedings of the Section of Insurance Law, American Bar Association 29, 34 (1946); *Sawyer, Insurance as Interstate Commerce*, 78-81 (1945); *Dineen, The Rating Problem, Proceedings of the Section of Insurance Law*. American Bar Association 104, 109-10 (1945).

It is the petitioner's position that the statutory standard in Ohio, if there is one, is a sham. The Sixth Circuit Court of Appeals in the instant case was impressed that Title 39 of the Ohio Revised Code sets forth a "scheme for the regulation of automobile liability and property damage insurance," 451 F.2d 1178, 1181. The Court notes, *id* at 1183, that at least once every five (5) years, rating organizations are required to be examined.

Despite this directive of examination, the Department of Insurance has examined only two (2) rate bureaus in the last five (5) years; it has conducted only six (6) examinations in twenty (20) years — *Rose, supra*, 51.

Ohio Revised Code Sections 3935.12 and 3935.09 give the Ohio Department of Insurance the right to examine "advisory organizations." The sub-committee on Anti-Trust and Monopoly of the United States Senate Committee on the Judiciary has reported that state insurance departments "have not been sufficiently aware of the

scope of the 'advisory organizations' activities;" S. Rep. No. 831, 87th Congress; 1st Sess. 124 (1961), yet the Ohio Department has never examined the advisory organizations or conducted any hearings to determine whether they have violated the law. *Rose, supra* at 495.

It is petitioner's further position that the State cannot merely enact a law and walk away. It cannot permit the insurance industry to fix its own rates at will. The allegation in the lower Court is that the State has abdicated its function of regulating insurance in favor of the insurance industry itself. The lower Court cannot disregard such allegation on the reasoning that there is a statute established by the State.

The State cannot nullify Federal anti-trust laws by authorizing private persons or groups subject to the anti-trust laws to do what such laws forbid.

In *Parker v. Brown,* 317 U.S. 341 (1943), the Court explicitly stated:

> a State does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

In *Parker, supra,* after inquiry into the state law and the facts, the Court found that there was state regulation. The Court was talking about the *degree of actual participation* by the State in the rate making process. The Parker case clearly indicates that the Court has jurisdiction to examine the state legislation and to determine the degree of state participation.

As the Court in *Parker* concluded at 317 U.S. 350, 352:

> Although the organization of a pro-rate zone is proposed by producers and a pro-rate program, approved by the commission, must also be approved by referendum of producers, *it is the state* acting through the commission, *which adopts the program*

> and *which enforces it with penal sanctions*, on the execution of a governmental policy. (Emphasis added.)

Just as in *Parker, supra*, it was incumbent upon the District Court to look at the substance of the state regulation. Such an examination will demonstrate that the Ohio legislation authorizes the private combination of insurance companies through their Rating Bureau to fix rates for automobile insurance *without approval of any State authority*. Because of this lack of state activity or control, the defendants are amenable to the Sherman Act. The State simply cannot nullify the anti-trust laws by authorizing private persons or groups to do what such laws prohibit.

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) the Court struck down the contention of immunity from anti-trust because of state legislation on the subject matter. In that case two distillers sought to enjoin Schwegmann Bros.'s from cutting retail prices on liquor products. The distillers, under the Louisiana Fair Trade Act's non signer clause, sought an injunction to stop the price cutting. The United States Supreme Court held that the action could not be maintained on the ground that the efforts of the distillers to impose price control upon an unwilling dealer amounted to a violation of the Sherman Anti-Trust Act even though authorized by State law.

In addition the Supreme Court has indicated that, with regards to insurance, it will look to the substance of the State Legislation and the regulation thereunder. In *Federal Trade Commission v. National Casualty Co.* 357 U.S. 560, 565 (1958) the Court noted:

> that each State has enacted prohibiting legislation which prescribed unfair insurance advertising and

> authorizes enforcement through a scheme of administrative supervision. Petitioner does not argue that the statutory provision here under review were *mere pretense*. (Emphasis added.)

The State Legislation is subject to the scrutiny of the federal judiciary to determine whether it is a mere pretense.

In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 430 (1946), the first case after *Southeastern Underwriters*, the Court served notice that the *McCarran Act* was not a rubber stamp for State Legislatures to delegate to Rating Bureaus the governmental duty to regulate.

The legislative scheme chosen by Ohio is a naked delegation of public power to private interests. As such it must fail. Under that scheme, of which this Court must take judicial notice, the rate takes effect upon filing, remains in effect regardless of what the Insurance Superintendent may do, and makes no provisions for adjustment in the event the rate is ultimately found excessive. Likewise, no judicial review is provided to the public.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for the writ of certiorari should be granted.

Respectfully submitted,

STEWART R. JAFFY
Attorney for Petitioners

APPENDIX A

STATUTES INVOLVED

15 U.S.C. § 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX B

IN THE FEDERAL DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

[CAPTION OMITTED]

Civil No. 68-254

COMPLAINT

1. This action arises under a law to protect trade and commerce against restraints and monopolies, in particular (Title 15, U.S.C.), as herein after more fully appears. This is an action to enjoin violation of the Sherman Anti-Trust Act, 15 U.S.C. §1, *et seq.*, as hereinafter more fully appears. Jurisdiction is conferred upon this Court by 15 U.S.C. § 26.

2. The plaintiffs, OHIO AFL-CIO and The United Autoworkers of Ohio are a statewide organizations representing union members in the State of Ohio, many of whom are insured by companies covered by the automobile insurance rate increases put into effect by the Insurance Rating Board and its predecessor organizations, National Bureau Casualty Underwriters (N.B.C.U.) and National Automobile Underwriters Association (N.A.U.A.) and join the plaintiff, Ira Thompson, a policyholder of a member of the Insurance Rating Board, to bring this action on behalf of all automobile insurance policyholders in the State of Ohio who have been and will be affected by the automobile insurance increase rates. Numerous members of the OHIO AFL-CIO and The United Autoworkers of Ohio are aggrieved by the conduct of the defendant's as hereinafter set forth and are

in the same or similar position as is the plaintiff, Ira Thompson. The questions of law and fact raised herein are common to the class, the claims are typical of those in the class and the representative parties will fairly and adequately protect the interest of the class.

3. Ira Thompson, is a resident of the State of Ohio, City of Columbus, County of Franklin and is licensed by the State of Ohio to operate a motor vehicle and owns a duly licensed motor vehicle. In order to retain his operator's and motor vehicle licenses upon the city, county, state and interstate traffic arteries within the State of Ohio it is necessary that the plaintiff, Ira Thompson, have liability insurance upon his automobile or be in a financial position to post cash as financial security in the amount of any potential recovery in the event he should be involved in an automobile collision regardless of his fault under the laws of the State of Ohio.

4. Petitioners further state that on July 10, 1968, the Insurance Rating Board by its unilaterial action of filing a rate increase, raised automobile insurance premiums charged by its members, subscribers and affiliates throughout the State of Ohio, all without any state regulation to the detriment of members of the OHIO AFL-CIO, The United Autoworkers of Ohio, Ira Thompson and all others similarly situated

5. The plaintiff further states the defendant Insurance Rating Board is a non-resident association with its principal place of business in New York and is duly licensed to operate in this State as a rating bureau.

6. Petitioners state that the defendant, Insurance Rating Board, is composed of approximately 129 Insurance Companies which are members and subscribers, all of whom have started charging said new premiums on the aforesaid effective date.

7. The defendant United States Fidelity Guaranty Company is a duly licensed corporation with its principal place of business in Baltimore, Maryland and is authorized to do business in the State of Ohio, and is a member or subscriber of the Insurance Rating Board.

8. The plaintiff further states that the defendant Eugene Brown is the duly appointed, qualified, and acting Superintendent of Insurance for the State of Ohio.

9. The members and subscribers of the Insurance Rating Board other than those members specifically named party defendant are hereby sued as a class. They constitute a class of persons having identical interests in the subject matter of this action and are so numerous as to make it impracticable to bring them all before the court. Insofar as the character of the right sought to be enforced against them by this action is severable, the questions of law and fact affecting their several rights are common, and common relief is sought against them. The joinder of the Insurance Rating Board and The United States Fidelity and Guaranty Company hereinbefore specifically named as party defendants, will fairly insure the adequate representation of all other members and subscribers of the Insurance Rating Board.

10. The acts and conduct of the defendants and their co-participants, the members and subscribers of The Insurance Rating Board, hereinafter referred to constitute a combination and conspiracy to restrain trade and commerce and to fix rates in the automobile casualty insurance industry among the several states and to monopolize and attempt to monopolize a part of such trade and commerce.

11. It is further alleged that automobile liability insurance can only be acquired in the State of Ohio from

insurance companies duly licensed to do business in the State of Ohio.

12. Petitioners state that the aforesaid Insurance Companies write approximately 17% of the automobile liability insurance in Ohio and approximately 22% of the physical damage insurance written in the State of Ohio and through their rates and practices influence all automobile insurance rates charged throughout the State.

13. The sale of the liability insurance, liability and collision insurance policies on automobiles constitutes commerce among the several states. Beginning on or about the year 1948 and continuing without interruption thereafter to the filing of this complaint, defendant The Insurance Rating Board and its predecessors and its members and subscribers acting in concert with the various Departments of Insurance among the several states have violated and are now violating said Sherman Anti-Trust Act by unlawfully contracting, combining and conspiring to restrain trade in commerce among several states in the business of automobile casualty insurance and by unlawfully contracting, combining and conspiring to control, regulate and dictate terms and fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and the other several states.

14. Petitioners further state that this is the third unilateral rate increase instituted by The Insurance Rating Board for its members and subscribers in the last three years without state regulation by concerted action in violation of the Sherman Anti-Trust Act; that this rate increase amounts to an increase on a statewide average of 7.9%; that the November 1966 rate increase was a statewide average increase of approximately 13.5% for bodily injury and property damage; that the

1965 rate increase was a statewide average increase of 4.4% for bodily injury and property damage; that similarly collision rate coverages were also increased in the aforesaid years.

15. Petitioners further state that the predecessors to the Insurance Rating Board, the N.B.C.U. and the N.A.U.A., raised the automobile insurance premiums in November 1966; that said rate increase was challenged by the OHIO AFL-CIO and Ira Thompson, petitioners herein; that the Ohio Court of Common Pleas has ruled that under Ohio law your petitioners may not appeal to the courts of the State of Ohio to challenge the automobile insurance rate increases and that the courts of the state are only open to an insurance company to challenge a rate change; that the aforesaid case is presently pending on the procedural question of right to appeal in an Ohio Court of Appeals; that since November 1966 the people of the State of Ohio have paid the higher rate put into effect by the concerted efforts of the predecessors to the Insurance Rating Board, its members and subscribers and the Department of Insurance, and continued to pay such increase until the new increase was made effective by the Insurance Rating Board on July 10, 1968.

16. Said unlawful conspiracy to monopolize, and the combination and conspiracy to restrain trade in commerce in the business of casualty insurance has consisted of a continuing agreement among defendants, The Insurance Rating Board and its members and subscribers, the substantial terms of which and the means of such concert of action are as follows:

(a) that defendant member and members and subscribers of The Insurance Rating Board make contracts agreeing to sell automobile insurance

policies to the public at rates which are to be fixed by The Insurance Rating Board.

(b) the defendant Insurance Rating Board makes a filing with the Ohio Department of Insurance of such proposed rate which takes effect immediately upon said filing contrary to the mandate of the McCarran-Ferguson Act which provides that the business of insurance must be regulated by the State.

(c) by setting out underwriting standards which have no reasonable relation to risk thereby causing enumerable individuals to pay more for insurance than other persons who present essentially the same risk to the insurer, thereby causing enumerable persons to be blacklisted from the insurance market place.

17. Plaintiffs further allege that under Ohio law each rate filing becomes effective immediately upon its filing and is deemed to comply with such sections of the Ohio Code as relate to insurance rate making unless such filing is later disapproved by the Superintendent of Insurance.

18. Petitioners further state that under Ohio law, Revised Code Chapter 3937, The Insurance Board, its members and affiliates and other insurance companies are permitted to set the effective date of any rate increases they desire to institute; that such rate increases become effective immediately upon the date set by said insurance companies; that such rate increases have never been challenged in Ohio by the Ohio Department of Insurance or anyone except the petitioners herein. The Department does not even employ or have on its staff an actuary so as to be able to examine the rate filing.

19. Petitioners further state that there is an absence of State regulation, and no effective or appropriate state regulation and that the State of Ohio has abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself.

20. Plaintiffs state that under the McCarran-Ferguson Act, Public Law 15, 1945, 15 U.S.C. § 1011, the federal law known as the Sherman Anti-Trust Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law".

21. Plaintiffs further state that the Insurance Rating Board and its members and affiliates are engaged in the co-operative making of rates through a rate making Bureau without state regulation as alleged aforesaid; all in violation of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C. § 1 *et seq.* prohibiting price-fixing.

22. Plaintiffs further allege that the Ohio law pertaining to auto insurance rate making was fostered by the insurance industry, is designed to protect said insurance industry and to exempt it from federal anti-trust regulation and that it does not provide for state regulation and that the State Agency serves only as a repository for the rate filings.

23. Plaintiffs further say that the system fostered by the industry results in a race for the preferred risk and permits insurance companies to refuse to accept below average risks on a voluntary basis, thereby arbitrarily fixing prices for other risks.

24. Plaintiffs further state that under the present system insurance companies engage in discriminatory actions by determining certain classes of people and

certain geographical areas where they will not write automobile insurance coverage and by engaging in tactics of mass cancellation of automobile insurance policies.

25. Plaintiffs further state that the insurance companies receive money in advance of periods of time when they actually earn said money by providing insurance coverage and hold said monies in trust for the policyholder in reserves called unearned premium reserves, and also hold the policyholders money in loss reserves and invest said monies, but do not in their computation of rates reflect any interest or dividends received from such monies in the determination of the rates to be charged; that this practice is not restrained or regulated under state law, permits a higher insurance premium to be charged and that such determination not to give an interest credit is a co-operative determination in violation of the Sherman Anti-Trust Act.

26. Plaintiffs further state that the Insurance Rating Board pools non-risk elements such as administrative expenses, acquisition cost and profit in determining the rates it will establish; that such rates are not uniform for all companies; that the rate established is weighted to protect the least efficient operator and is not regulated by the State; all in violation of the aforesaid Anti-Trust Law.

WHEREFORE, plaintiffs pray judgment as follows:

1. That said combination and conspiracy, contract, agreement, arrangement and understanding to restrain trade and fix rates, and said conspiracy to monopolize, attempt to monopolize trade and commerce be decreed unlawful, and in violation of the Sherman Anti-Trust Act.

2. That the Court decree that defendants have combined and conspired to restrain trade, to fix rates, to monopolize and attempt to monopolize interstate trade and commerce in the business of automobile casualty insurance in violation of the Sherman Anti-Trust Act.

3. That the Court issue a preliminary injunction restraining the defendant, Insurance Rating Board and its members and subscribers, from charging a rate other than the rate made effective in November 1966 during the pendency of this action.

4. That the defendant, Superintendent of Insurance, be enjoined from accepting any further filings for rate increases during the pendency of this action and that the defendant, Insurance Rating Board, be enjoined from filing any further rate increases in the State of Ohio during the pendency of this action.

5. That the defendants and each of them and their officers, directors, agents, representatives, and all persons and corporations, acting or claiming to act on their behalf, be perpetually enjoined from combining or conspiring or agreeing to restrain trade, to fix rates, to monopolize and attempt to monopolize trade and commerce in the automobile casualty insurance industry, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships, or understandings having the purpose or effect of continuing, reviving, or renewing the violations of the Sherman Anti-Trust Act hereinbefore set forth.

6. That the Court award treble damages and other statutory benefits to the plaintiffs.

7. That plaintiffs recover their costs herein and have such other relief as the Court may deem proper.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

OHIO AFL-CIO, et al,

Plaintiffs,

vs.

THE INSURANCE RATING BOARD, et al,

Defendants.

Civil Action 68-254

OPINION AND ORDER

This matter is before the Court on the motion of the defendants, The Insurance Rating Board and the United States Fidelity and Guaranty Company, to dismiss on the ground that the Court lacks jurisdiction over the subject matter of the action.

The complaint alleges that jurisdiction arises under the provisions of the Sherman Act, 15 U.S.C.A., § 1, *et seq.* The complaint further alleges that on July 10, 1968, in accordance with the provisions of Chapter 3937, Ohio Revised Code, The Insurance Rating Board, a group of 129 insurance companies, "by its unilateral action of filing a rate increase, raised automobile insurance premiums charged by its members, subscribers and affiliates throughout the State of Ohio, all without any state regulation to the detriment of" plaintiffs.

The complaint asserts defendants' actions "constitute a combination and conspiracy to restrain trade and commerce and to fix rates in the automobile casualty insurance industry among the several states and to monopolize and attempt to monopolize a part of such trade and commerce."

Defendants contend the Sherman Act is inapplicable because the business of insurance, including insurance rates, is regulated by Ohio law and is thus exempt from federal anti-trust laws by the McCarran Act, 15 U.S.C.A., §§ 1011 through 1015. Plaintiff contends the business of insurance is not regulated by Ohio law and is therefore subject to the provisions of the Sherman Act.

The McCarran Act contains the following relevant provisions:

§ 1011 Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest. . . .

§ 1012 **(a)** The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair or supersede any law by any state for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance: *Provided,* that . . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

In *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533 (1944) the United States Supreme Court held the business of insurance was in or affecting interstate commerce and that it was subject to the provisions of the Sherman Anti-Trust Act. The very next year Congress passed the McCarran Act. The United States Supreme Court upheld the constitutionality of

the McCarran Act in *Prudential Insurance Co.* v. *Benjamin,* 328 United States 408 (1946).

The issue before the Court is whether, assuming the factual allegations of the complaint to be true, Ohio "regulates" the business of insurance within the meaning of the McCarran Act.

Plaintiffs argue that "regulation" means *effective* regulation. In support of the position, plaintiffs assert automobile liability insurance is virtually compulsory, creating a seller's market. Congress, knowing the monopolistic tendency of such a market, must have intended that only effective regulation should exempt the business of insurance from the Sherman Anti-Trust Act.

Plaintiffs further argue that when statutory provisions are "mere pretense" they do not constitute regula- of the business of insurance. *Cf., Federal Trade Commission* v. *National Casualty Co.,* 357 U.S. 560, 564 (1958). Plaintiffs assert that Chapter 3937, Ohio Revised Code, and the history of the operation under Chapter 3937, prove Ohio does not regulate the business of insurance.

Plaintiffs allege the Superintendent of Insurance's staff is inadequate to review information relating to rate changes, and that the Superintendent of Insurance has never challenged a rate increase filed by the Insurance Rating Board contrary to the practice in other states.

The Ohio statutory scheme relating to casualty insurance is as follows:

1. Rating organizations, such as The Insurance Rating Board, are licensed by Ohio under the provisions of § 3937.05, Ohio Revised Code. These are voluntary associations comprised of insurers. The Superintendent of Insurance is required to examine each rating organization at least once every five years. § 3937.11, Ohio Revised Code.

2. Each rating organization files the manuals of classifications, rules, rates and rating plans which it proposes to use with the Superintendent.[1] Each filing becomes effective immediately upon its filing and is deemed to comply with Chapter 3937 unless disapproved by the Superintendent. § 3937.03, Ohio Revised Code.

3. The casualty rates must comply with statutory standards, including the requirement that they "shall not be excessive, inadequate, or unfairly discriminatory." § 3937.02, Ohio Revised Code.

4. If the Superintendent of Insurance determines the rates do not comply with Chapter 3937, Ohio Revised Code, he may, after a hearing, issue an order nullifying the new rates. § 3937.04, Ohio Revised Code.

5. The Superintendent's disapproval of a rate does not affect policies issued prior to his order of disapproval. § 3937.04, Ohio Revised Code. Moreover, if an insurer appeals the Superintendent's order, the order does not go into effect until after the appeal has been finally adjudicated. § 3937.15, Ohio Revised Code. Thus, a rate filed by a rating organization may remain in full force and effect for a substantial period of time following the Superintendent's disapproval.

6. Chapter 3937 makes several provisions for appeal to the Superintendent.
   a. The rating organization is entitled to a hearing if the Superintendent determines the rates do not comply with Chapter 3937. § 3937.04, Ohio Revised Code.

[1] If an insurer is not a member or subscriber of a rating organization, he may file his rates in the same manner as a rating organization. §3937.03, Ohio Rev. Code.

b. "Any person . . . aggrieved with respect to any filing" may request the Superintendent to hold a hearing. § 3937.04, Ohio Revised Code.

c. Any member or subscriber to a rating organization may appeal to the Superintendent from a decision of or action taken by a rating organization. § 3937.07, Ohio Revised Code.

d. An insured may request "all pertinent information" with respect to a rate from a rating organization and a review of the rate. If the rating organization fails to grant or reject the request within 30 days, the insured may appeal to the Superintendent. § 3937.08, Ohio Revised Code.

7. If a rating organization fails to comply with an order of the Superintendent, he may suspend the license of the rating organization. § 3937.16, Ohio Revised Code.

8. "Any order or decision of the Superintendent [under Chapter 3937] is subject to review by the courts" of Ohio. § 3937.15, Ohio Revised Code.[2]

In construing these provisions, the Court must consider the following declaration of legislative intent:

> [Chapter 3937] shall be liberally interpreted to the end that insurance rates shall not be excessive, inadequate or unfairly discriminatory, and cooperative action among insurers in rate making and in other matters within the scope of such sections shall be authorized and regulated. . .

The Ohio statutory scheme does not provide for rates set independently by an officer of the state, nor does it

[2] *But cf., Lynch v. Insurance Rating Board*, Civ. No. 5205, Franklin County Common Pleas Court, December 4, 1968.

provide that rating organizations merely make *recommendations* which can be adopted or rejected by an officer of the state. Plaintiffs assert that such statutes are models of true regulation, as opposed to Ohio's ineffective regulatory scheme.

A court is not empowered to make a policy judgment as to the type of regulation which is desirable. The Ohio Legislature has adopted a statutory scheme which sets standards for insurance rates. This Court is not concerned with the wisdom of the standards, but with the limited question of whether or not the legislation is regulation under the McCarran Act.

A legislature has adopted a regulatory scheme if the statute "generally [prohibits] certain standards of conduct." See, *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. at 564. Ohio has provided general standards for the operation of the business of insurance and procedures for effectuating these standards. Thus, Ohio regulates the business of insurance within the meaning of 15 U.S.C.A. §§ 1011 through 1015. See, *Allstate Ins. Co.* v. *Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965), *aff'd.* 361 F. 2d 870 (4th Cir. 1966); *California League of Ind. Ins. Producers* v. *Aetna Cas. & Surety Co.*, 175 F. Supp. 857 (N.D. Calif. 1959).

Sections 1010 and 1011 of the McCarran Act provide that an action under the Sherman Act will not lie when the business of insurance is regulated by a state. Therefore, this Court lacks jurisdiction over the subject matter of this action.

WHEREUPON, the Court holds the motion is meritorious and therefore IT IS GRANTED.

This action is hereby DISMISSED.

JOSEPH D. KINNEARY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

OHIO AFL-CIO, et al,

Plaintiffs,

vs.

THE INSURANCE RATING BOARD, et al,

Defendants.

Civil Action 68-254

ORDER

This matter is before the Court on the motion of the defendant, Eugene Brown, Superintendent of Insurance, State of Ohio, to dismiss on the ground that the Court lacks jurisdiction over the person of the defendant.

The Court has granted the motion to dismiss of the defendants The Insurance Rating Board and the United States Fidelity and Guaranty Company on the ground that the Court lacks jurisdiction over the subject matter of the action; therefore, it is unnecessary for the Court to consider the grounds alleged by this defendant.

Upon consideration and being fully advised, the Court determines it lacks jurisdiction over the subject matter of this action.

This action is hereby DISMISSED.

JOSEPH D. KINNEARY
United States District Judge

APPENDIX D

No. 71-1202

United States Court of Appeals

FOR THE SIXTH CIRCUIT

OHIO AFL-CIO, THE UNITED AUTOWORKERS OF OHIO, and IRA THOMPSON,
Plaintiffs-Appellants,
v.
THE INSURANCE RATING BOARD, UNITED STATES FIDELITY AND GUARANTY COMPANY, and EUGENE BROWN,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed November 30, 1971.

Before: PHILLIPS, Chief Judge, McCREE and MILLER, Circuit Judges.

MILLER, Circuit Judge. This is an antitrust action instituted by Ohio AFL-CIO, The United Autoworkers of Ohio, and Ira Thompson as a licensed automobile operator in Ohio carrying automobile liability insurance, against the Insurance Rating Board (IRB), one of its members, United States Fidelity and Guaranty Company (USF&G), and Eugene Brown, the Ohio Superintendent of Insurance, alleging violations of the Sherman Antitrust Act by a combination and conspiracy in the fixing of prices of automobile insurance premiums. It is alleged that rate increases were instituted by the IRB

in Ohio in 1965, 1966 and 1968 on a state-wide average for automobile liability insurance of 4.47%, 13.5% and for automobile liability and property damage of 7.9%, respectively, without any state regulation.

The complaint seeks injunctive relief against the charging of rates other than the rates made effective in November 1966, against the acceptance of any further filings for rate increases during the pendency of the action, and against any combination or conspiracy to restrain trade or to monopolize trade and commerce in violation of the Sherman Antitrust Act. There is also a claim for treble damages and other statutory benefits.

There are general allegations in the complaint to the effect that the IRB and its predecessors and its members and subscribers acting in concert with various departments of insurance among the several states have violated and are now violating the Sherman Antitrust Act by unlawfully contracting, combining and conspiring to restrain trade in interstate commerce with respect to the business of automobile casualty insurance and by unlawfully contracting, combining and conspiring to control, regulate and dictate terms and fix the prices upon which automobile liability and collision insurance shall be sold throughout Ohio and other states.

It is alleged that the IRB is composed of 129 insurance companies which are members and subscribers, all of whom have started charging increased premiums approved by the IRB on July 10, 1968, for automobile insurance "all without any state regulation to the detriment of the members of the Ohio AFL-CIO, the United Autoworkers of Ohio, Ira Thompson, and all others similarly situated." It is further alleged that the insurance companies having membership in the IRA write approximately 17% of the automobile liability insurance in Ohio

and approximately 22% of the physical damage insurance in that state and "through their rates and practices influence all automobile insurance rates charged throughout the state." The complaint proceeds to allege further that under Ohio law, Revised Code Chapter 3937, the IRB, its members and affiliates and other insurance companies are permitted to set the effective date of any rate increases that they desire to institute; that such rate increases become effective immediately upon the date set by the said insurance companies; that such rate increases have never been challenged in the State of Ohio by the Department of Insurance or by any one except the plaintiffs; and that "the Department does not even employ or have on its staff an actuary so as to be able to examine the rate filing." *In essence the complaint is that there is an absence of state regulation in Ohio and that that state has abdicated its function of regulating the automobile insurance industry in favor of regulation by the automobile insurance industry itself.* The defendants, IRB, USF&G, and the Superintendent of Insurance, moved to dismiss the complaint on the ground of lack of jurisdiction of the Court because of the exemption of the business of insurance from the operation of the antitrust laws provided for by the McCarran Act, 15 U.S.C. Sec. 1011. In the alternative, they moved for dismissal of the complaint for failure to state a claim on which relief could be granted and for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

The district court in its opinion held that the Ohio statutory scheme for regulating the business of insurance *constituted regulation within the meaning of 15 U.S.C. Sec. 1012(b)*, providing that the antitrust laws "shall be

applicable to the business of insurance to the extent that such business is not regulated by state law." Answering the plaintiffs' argument that the Ohio scheme of regulation was not effective and therefore could not be deemed to constitute the kind of regulation contemplated by the McCarran Act, the district court stated: "A court is not empowered to make a policy judgment as to the type of regulation which is desirable. The Ohio legislature has adopted a statutory scheme which sets *standards* for insurance rates. This court is not concerned with the wisdom of the standards but with the limited question of whether or not the legislation is regulation under the McCarran Act."

Citing *Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 564, the court held that Ohio had provided general standards for the operation of the business of insurance and consequently that Ohio had "regulated" the business of insurance within the meaning of the statutory exemption. Pursuant to this opinion the *court dismissed the complaint for lack of jurisdiction of the subject matter* without considering the alternative motion for summary judgment: On appeal, the principal issue before us is whether the district court was correct in its conclusion that Ohio regulated the business of automobile insurance so as to qualify for the McCarran Act exemption.

Upon consideration of the applicable Ohio statutes we conclude that the business of insurance in Ohio is "regulated" to the extent contemplated by the McCarran Act.

The Supreme Court in *Paul* v. *Virginia*, 8 Wallace 168 (1868), held that the transaction of insurance business does not constitute interstate commerce and that the states were therefore free to subject such business to state regulation. See also *Hooper* v. *California*, 155 U.S.

648, 655 (1895), and *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U.S. 495, 510 (1913). Consequently, the insurance business was extensively regulated by the various states. In 1944, however, the court in *United States* v. *Southeastern Underwriters Association*, 322 U.S. 533, re-examined this question and came to the conclusion that an insurance company conducting a substantial part of its business across state lines is engaged in interstate commerce and is subject to regulation by Congress under the Commerce Clause of the Constitution. In consequence it was held that the Sherman Antitrust Act is applicable to the business of insurance. Reacting to this decision, Congress enacted legislation in 1945 and 1947, declaring that it was in the public interest for the business of insurance to continue to be regulated by the several states and specifically exempting such business from the operation of the antitrust laws to the extent that such business is regulated by state law. 15 U.S.C. Secs. 1011 and 1012.[1]

In *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-430 (1946), it was held that the purpose of Congress in enacting the McCarran Act was broadly to "give support to the existing and future state systems for regulating and taxing the business of insurance." A number of authorities have considered the question of what constitutes "regulation" within the meaning of the McCarran Act so as to activate the McCarran Act exemption. Without examining these cases in detail, none of which has failed to apply the exemption, we think the United States

[1] 15 U.S.C. Sec. 1012(a) provides that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation of taxation of such business." Sec. 1012(b), commonly referred to as the McCarran Act, provides in pertinent part that various antitrust statutes shall be applicable to the business of insurance "to the extent that such business is not regulated by state laws."

District Court for the Northern District of California made a correct statement of the law in *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (1959), when it said:

> This Court is of the opinion that a State regulates the business of insurance within the meaning of Sec. 1012(b) when a State statute *generally proscribes* (F.T.C. v. National Cas. Co., 1958, 357 U.S. 560, 78 S.Ct. 1260, 2 L. Ed. 2d 1540) or *permits or authorizes certain conduct on the part of the insurance companies.* In F.T.C. v. National Cas. Co., supra, the Court held that there was State regulation within the meaning of § 1012(b) when a State act generally prohibited "certain standards of conduct." 357 U.S. at page 564, 78 S. Ct. at page 1262. From the above case it would seem to follow that if a state has generally authorized or permitted certain standards of conduct, it is regulating the business of insurance under the McCarran Act.

Examining the applicable Ohio statutes, we find that the state has adopted a *comprehensive scheme* for the regulation of automobile liability and property damage insurance, although concededly its scheme might not be as extensive or as stringent as some of the other states. The conclusory statements of the complaint in this case that Ohio has not regulated this type of insurance business or that it has not effectively done so are, in our view, untenable.

The McCarran Act does not define the term "regulation" and no satisfactory definition is to be derived from its legislative history. Nevertheless, we are convinced that the controlling test is that stated by the District Court for the Northern District of California in the *Aetna Casualty* case cited above, i.e., whether the state has "generally authorized or permitted certain standards

of conduct." Title 39, Chapters 3901 to 3999 of the Revised Code of Ohio, sets forth a comprehensive scheme for regulating practically all aspects of the business of insurance as transacted in that state. This includes the creation of a department of insurance, establishment of the office of superintendent of insurance, provision for appointment of employees for prompt dispatch of business, the granting of specific powers to the superintendent, including the power of inquiry, investigation and examination of insurance companies, and generally the regulation of the business of insurance. The organization of insurance companies of various kinds, domestic and foreign, are provided for. The statutes provide for the liquidation of insurance companies, the regulation of insurance agents, and the definition of investments which insurance companies may legally make. Crucial to the present case is the fact that the Ohio statutes have specifically provided for the regulation of rating organizations such as IRB, and the making, filing and use of rates for casualty insurance, including motor vehicle insurance. Chapter 3937. Each member or subscriber to a rating organization is *required to adhere* to the rate filing made on its behalf by such organization. 3937.06. As to filed rates, every member and subscriber has the right by and in accordance with the *statute to deviate* from such filed rates. 3937.06. Cooperative action among insurers in ratemaking and in other matters within the scope of the statute is authorized and regulated. Chapter 3937.17 provides that the chapter pertaining to casualty motor vehicle insurance shall be liberally interpreted to the end that insurance rates shall not be excessive, inadequate, or unfairly discriminatory. Sec. 3937.02 sets forth in specific terms the criteria which shall govern all casualty rates. Every insurer is

required to file every rate which it intends to use and the information with which the insurer supports such filing if the superintendent does not have it. Sec. 3937.03(A). Each filing becomes effective immediately upon its filing and is deemed to comply with such sections unless disapproved by the superintendent as provided in Sec. 3937.04 of the Revised Code. Sec. 3937.03(C). Insurance companies are prohibited from issuing a contract or policy except in accordance with filings which are in effect for the insurer. 3937.03(H). The superintendent is authorized to cancel any contract if at any time he finds after a hearing on notice that the rate does not comply with the statutory requirements. Sec. 3937.04(A). Such a hearing may be brought about upon written application of "any person or organization aggrieved with respect to any filing which is in effect," 3937.04(B), and a reasonable inference from the statute is that the superintendent himself may review any filings on his own initiative. While insurers may satisfy their obligation to file the rates which they intend to use by becoming a member of or a subscriber to a licensed rating organization which makes such filings, the statutes do not require any insurer to become a member of or a subscriber to any rating organization. 3937.03(B). Members and subscribers to rating organizations may file a uniform percentage decrease or increase in rates filed for them by the rating organization. 3937.06. Rating organizations themselves under Ohio law are required to be licensed and to apply for such license in accordance with the procedure outlined in 3937.05. The license is issued only after a finding by the Superintendent of Insurance that the applicant is competent, trustworthy and qualified otherwise to act as a rating organization and that its constitution, articles of agreement or association

. . . and its by-laws, rules and regulations governing the conduct of its business conform to the law . . . . 3937.-05(A) (4). Although cooperation among rating organizations or among rating organizations and insurers in rate-making is expressly authorized, the superintendent may review such cooperative activities and, after hearing, direct the discontinuance of any activity which he feels to be unfair, unreasonable or otherwise inconsistent with statutory regulations. 3937.05(D). Extensive provisions are made to protect the right of members and subscribers of rating organizations relative to reasonableness of activities by the rating organization affecting the member or subscriber and providing for appeals to the superintendent. Secs. 3937.05(B); 3937.07. Both rating organizations and insurers making their own rates are required to furnish to any insured affected by a rate made by it any pertinent information as to such rate and to grant a hearing to such insured if requested. The decision of the rating organization as to its rating system is subject to appeal to the superintendent. 3937.08. At least once in every five years rating organizations are required to be examined, 3937.11, and the officers, agents and employees of the organization may be examined at any time and shall exhibit all books, records, accounts, documents, or agreements governing its method of operation. Other provisions regulate different aspects of automobile insurance in Ohio, but we think that the provisions cited demonstrate beyond doubt that the business of insurance in Ohio is comprehensively and effectively "regulated" so as to qualify such business for the McCarran Act exemption.

Appellants point to certain alleged deficiencies in the Ohio scheme of regulation. For example, it is argued that under the Ohio statutes each filing becomes effective

immediately and is deemed to comply with the law unless disapproved by the superintendent, with the result that the rating bureau may put a higher rate into effect without prior approval by the state department of insurance. It is pointed out that the Ohio statutes further provide that after filing the rate remains in effect until an appeal is finally adjudicated. Moreover, if the rates filed are disapproved by the superintendent, the order of disapproval does not affect any policy made prior to the expiration date specified in the superintendent's order. A further alleged defect is the apparent provisions that no order or decision of the superintendent is effective until after final action or decision by the court on judicial review. If it should happen that the highest court should hold that such rate is excessive, the insurance companies are allowed to retain the excessive amount received.

An ideal type of regulation may possibly envision the removal of the alleged deficiencies in the Ohio statutes referred to by the appellant. Yet the question before us is not whether the Ohio method of regulation compares favorably with the regulations of other states, or whether it is an ideal manner in which to regulate the business of insurance. We are confident that Congress in enacting the McCarran Act did not intend to impose a uniform standard of regulation upon all of the states. It is our view that the congressional intent was to leave to the judgment of each state the specifics of regulation which it should see fit to adopt. Suffice it to say at this point that we are confident that the comprehensive plan adopted by Ohio is fully adequate to meet the requirements of regulation contemplated by the McCarran Act.

It is interesting to note that since the passage of the McCarran Act a number of actions have been filed in

which the McCarran Act exemption has been examined in terms of state regulation of the business of insurance. Yet in no case has it been decided that the exemption was inapplicable because of a failure of state regulation. In this connection, see *North Little Rock Transportation Co., Inc.* v. *Casualty Reciprocal Exchange,* 85 F.Supp. 961 (E.D. Ark. 1949), *aff'd* 181 F.2d 174 (8th Cir.), *cert. denied* 340 U.S. 823 (1950); *California League of Ind. Ins. Producers* v. *Aetna Cas. & Surety Co.,* 175 F.Supp. 857 (N.D.S.D. Cal., 1959); *Allstate Insurance Co.* v. *Lanier,* 242 F.Supp. 73 (E.D. N.C. 1965), *aff'd* 361 F2d 870 (4th Cir. 1966), *cert. denied* 385 U.S. 930; and *Lynch* v. *Insurance Rating Board,* D.C. M.D. Tenn. No. 5202 unreported.

We find no support for the appellants' argument that the court in this case should inquire into the question as to whether the statutes of Ohio have been effectively enforced in accordance with their terms. As pointed out in the *Lynch case, supra,* there is nothing in the language *of the McCarran Act or in its legislative history to support the thesis that the Act does not apply when the state's scheme of regulation has not been effectively enforced.* The Senate Sub-Committee reviewing the intention of the McCarran Act has so interpreted the decision in the *National Casualty* case in a report which states in part as follows: (Report of the Senate Sub-Committee on Anti-Trust and Monopoly, "The Insurance Industry—Aviation, Marine and State Regulation," Rep. No. 1834, 86th Cong., 2d Sess. (1960) at p. 5):

> It now seems evident from this Supreme Court decision that the McCarran Act language, 'to the extent that such business is not regulated by State law,' restricts Federal authority regardless of whether the States are actively enforcing their reg-

> ulations. If the States have enacted regulatory statutes, *capable of being enforced within their borders,* the Federal antitrust laws would apparently not apply. In such cases, no proof would apparently be entertained as to the extent to which the law had been administratively enforced. It also seems doubtful the Court would permit a questioning as to the quality of the State regulatory law.

Moreover in the present case, while the appellants insisted in their appellate brief and in oral argument that the Ohio scheme is a mere "pretense" and "sham", no such language is employed in the complaint. The nearest thing to an allegation that the Ohio scheme was not enforced is the statement in the complaint that insurance rate increases have never been challenged in Ohio by the Department of Insurance and that the department does not employ an actuary so as to be able to examine rate filings. These statements do not necessarily establish a policy of non-enforcement in Ohio and certainly are insufficient to show that the regulation of insurance in that state is a mere "sham" or pretense."[2] It is true that the complaint contains a number of conclusory statements to the effect that the appellees are allowed to control insurance rates in Ohio without state regulation or with no regulation. These conclusions are not only in conflict with the elaborate statutory scheme prescribed by Ohio law, but in any event are not sufficient on a motion to dismiss for failure to state a claim to develop a factual issue which the appellees are required to meet.

As we have concluded that the State of Ohio has regulated the business of automobile insurance within the meaning of the McCarran Act exemption, it follows that

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[2] Cf. *Federal Trade Commission* v. *National Casualty Co.*, 351 U.S. 560, 564-65 (1960).

the district judge was correct in granting the motion to dismiss the complaint. It then became unnecessary for him to consider the motion for summary judgment for, as we have pointed out, the pertinent question before him on the motion to dismiss was the existence in Ohio of a statutory scheme of regulation sufficient to satisfy the McCarran Act and not how the scheme worked in actual practice.

Concluding, as we do, that the complaint failed to state a claim on which relief could be granted, it would not be proper to remand the action to the district court for consideration of any possible factual issues.

AFFIRMED.